

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERORD LARON ROBINSON,

Defendant-Appellant.

UNPUBLISHED

September 14, 2010

No. 287952

Kalamazoo Circuit Court

LC No. 2007-001630-FC

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, assault with intent to commit murder, MCL 750.83, and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to life imprisonment for first-degree murder, two years' imprisonment for each felony-firearm conviction, 25 to 50 years' imprisonment for the assault with intent to murder conviction, and 2 years to 7 years and 6 months' imprisonment for the felon in possession conviction. We affirm.

Defendant contends that the trial court abused its discretion in denying his postverdict motion for a new trial on the basis of ineffective assistance of counsel and abused its discretion in denying his motion for a *Ginther*¹ hearing. We review a trial court's ruling on a motion for a new trial for an abuse of discretion. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). We also review a trial court's decision whether to hold an evidentiary hearing for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008). Whether a defendant was denied his right to the effective assistance of counsel generally presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error and issues of constitutional law are reviewed de novo. *Id.* Because the trial court did not hold a *Ginther* hearing, our review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

In order to demonstrate that he was denied the effective assistance of counsel, a defendant must first show that trial counsel's performance was "deficient," and second, a defendant must show that the deficient performance prejudiced the defense. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Id.* at 600. "Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004).

First, defendant argues that counsel was ineffective when she failed to call two police witnesses to testify for the defense. Decisions concerning whether to call witnesses are presumed to be matters of trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). "We will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *Unger*, 278 Mich App at 242-243. "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." *Payne*, 285 Mich App at 190 (quotation omitted). A "substantial defense" is a defense that "might have made a difference in the outcome of the trial." *People v Robert Kelly*, 186 Mich App 524, 526-527; 465 NW2d 569 (1990). After reviewing the record, we conclude that counsel's decision not to call the police witnesses did not deny defendant a substantial defense because the officers' testimony would not have affected the outcome of the trial. *Id.*

Second, defendant argues that defense counsel was ineffective when she cross-examined an eyewitness about the age of the person he saw shooting a gun. The questioning of a witness is presumed to be a matter of trial strategy, and this Court will not second-guess that strategy with the benefit of hindsight. *Dixon*, 263 Mich App at 398. Defendant fails to show how questions concerning the shooter's apparent age would have made any difference at trial. The evidence supported that defendant was the only shooter wearing a hooded sweatshirt. Witnesses testified that a man wearing a hooded sweatshirt was standing and shooting. The eyewitness testified that he did not get a good view of the shooter and the shooter's age was immaterial in this case. See *Payne*, 285 Mich App at 191 ("Trial counsel is not ineffective for failing to advocate a meritless position.").

Third, defendant argues that defense counsel acted deficiently when she failed to introduce evidence that a codefendant was wearing a hooded sweatshirt and failed to introduce evidence of shell casings that were found near the scene of the shooting. A defense counsel's decision regarding what evidence to present is presumed to be a matter of trial strategy that we will not second-guess on appeal. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Here, counsel did not act deficiently in failing to introduce evidence that the codefendant was wearing a hooded sweatshirt because there was no admissible evidence to support that conclusion. With respect to the shell casings, there was no evidence that the shell casings came from inside the murder victim's vehicle, and instead, there was overwhelming evidence that defendant and his codefendant shot at the vehicle multiple times. Introduction of the irrelevant shell casings would have made no difference at trial, and counsel was not deficient in failing to introduce the casings. *Id.*

Fourth, defendant argues that counsel was ineffective when she failed to investigate a source in a police report that suggested that someone inside the victim's own vehicle may have

shot the victim. Counsel's strategic decision not to investigate the source did not amount to deficient performance. Here, the source merely speculated about the victim's cause of death, and there was no evidence to support his theory such that counsel was remiss in failing to follow up on that theory. See *Payne*, 285 Mich App at 191.

Fifth, defendant argues that defense counsel rendered ineffective assistance of counsel when she failed to object to the self-defense instruction and the assault with intent to commit murder instruction. We review jury instructions in their entirety to determine whether the trial court committed error that requires reversal. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Imperfect instructions do not require reversal if they fairly present the issues being tried and sufficiently protect the defendant's rights. *Id.* If an instruction is omitted, reversal is not warranted "if the charge as a whole covers the substance of the omitted instruction." *Id.*

With regard to the self-defense instruction, "[i]n Michigan, the killing of another person in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v Kurr*, 253 Mich App 317, 320-321; 654 NW2d 651 (2002) (quotation omitted). Here, while the trial court initially stated that defendant was entitled to act in self-defense if he "honestly and reasonably believed that he was in danger of being killed," it later clearly informed the jury that, "defendant must have been afraid of *death or serious injury*." Furthermore, the trial court provided a written instruction to the jury that incorporated the "serious injury" language in the initial portion of the instruction. Viewed as a whole, the trial court properly informed the jury that defendant acted in self-defense if he had an honest and reasonable belief that he was in danger of being killed or seriously injured. *Id.* Because the trial court provided a proper self-defense instruction, defense counsel did not act deficiently in failing to raise an objection to the instruction. See *People v Snider*, 239 Mich App 393, 424-425; 608 NW2d 502 (2000) (counsel is not ineffective for failing to raise a futile objection).

With regard to the assault with intent to commit murder instruction, the elements of the offense are: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005) (quotation omitted). On appeal, defendant argues that the trial court's jury instruction on this offense was erroneous because the court did not instruct the jury that it "must find the intent to kill is shown under circumstances which would have made the killing murder." Defendant implicitly argues that the court should have included the language contained in the jury instructions that states the jury must find that the "circumstances did not legally excuse or reduce the crime." CJI2d 17.3(4). Because defendant advanced a self-defense theory in this case, the trial court should have included the language that the jury needed to determine that, if the attempted killing was successful, it would have amounted to murder. See *People v Hughes*, 160 Mich App 117, 119; 407 NW2d 638 (1987). However, even if counsel acted deficiently in failing to object to the instruction, her deficiency did not amount to ineffective assistance of counsel because it did not affect the jury verdict. *Carbin*, 463 Mich at 600. Here, the trial court provided the jury a self-defense instruction, and the jury rejected that defense and convicted defendant. The jury necessarily found that the circumstances involving the individuals in the victim's vehicle did not excuse defendant's actions when he shot multiple times at the vehicle.

Thus, the omitted language did not impact the jury's verdict with respect to the assault with intent to murder charge.

Finally, defendant argues that defense counsel was ineffective when she failed to request an instruction for the lesser offense of assault with intent to do great bodily harm less than murder. A decision regarding whether to request an instruction on a lesser-included offense is considered a matter of trial strategy. *People v Robinson*, 154 Mich App 92, 93-94; 397 NW2d 229 (1986). In this case, defense counsel argued that defendant acted in self-defense. Defense counsel's decision not to request an instruction on assault with intent to do great bodily harm less than murder coincided with her overall trial strategy and did not amount to ineffective assistance of counsel. See *People v Petri*, 279 Mich App 407, 412-413; 760 NW2d 882 (2008) ("A failed strategy does not constitute deficient performance.").

Because defendant was not denied the effective assistance of counsel, and because none of defendant's claims required an evidentiary hearing for further development, we conclude that the trial court did not abuse its discretion in denying defendant's motions for a new trial or for a *Ginther* hearing.

Next, defendant argues that the trial court's self-defense instruction and assault with intent to murder instruction denied him his due process right to a properly instructed jury and his right to a fair trial. Defendant failed to preserve these issues for review because he did not raise a contemporaneous objection to the instructions at trial. *People v Albert Kelly*, 231 Mich App 627, 645-646; 588 NW2d 480 (1998). Unpreserved instructional errors are reviewed for plain error that affected defendant's substantial rights. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

As discussed above, viewed as a whole, the trial court's self-defense instruction fairly presented the issues being tried and sufficiently protected defendant's rights. *Canales*, 243 Mich App at 574. There was no plain error requiring reversal. With regard to the trial court's assault with intent to commit murder instruction, as discussed *supra*, any error with respect to this instruction was harmless. Thus, any error did not affect defendant's substantial rights. *Aldrich*, 246 Mich App at 124-125. In sum, no plain instructional errors requiring reversal exist.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens